Filed 1/15/04 Martell v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH DISTRICT

DIVISION TWO

JERRY TODD MARTELL et al., Petitioners, v. THE SUPERIOR COURT OF THE COUNTY OF SAN BERNARDINO, Respondent; SHERYL BATES, Real Party in Interest.	E033626 (Super.Ct.No. SCVSS85534) OPINION

ORIGINAL PROCEEDINGS IN MANDATE. Kenneth G. Ziebarth, Judge. (Retired Judge of the San Bernardino Sup. Ct. assigned by Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Petition granted.

La Follette, Johnson, De Haas, Fesler, Silberberg & Ames and Dennis K. Ames for Petitioners.

No appearance by Respondent.

Law Offices of Marvin S. Shebby and Marvin S. Shebby for Real Party in Interest.

Petitioners (a physician, a medical group and a hospital) ask this court to order the trial court to vacate its order compelling petitioners to arbitrate a medical malpractice action. The trial court ordered petitioners to arbitrate pursuant to the mandatory arbitration provision in an agreement between real party's (the patient's) employer and her health insurance provider. As discussed below, we grant the petition because petitioners are merely independent contractors of the health insurance provider and so the provider had no authority to bind petitioners to the agreement to which they are not parties.

FACTUAL AND PROCEDURAL BACKGROUND

Real party's employer entered into a group services agreement with CIGNA Healthcare (Agreement). The Agreement requires binding arbitration of all malpractice disputes between patients and CIGNA "including any of their agents, successors-or-predecessors-in-interest or employees."[1]

Real party is suing petitioners for injuries she sustained while receiving medical services provided by petitioners under the health plan. Real party filed a motion in the trial court to compel arbitration, citing the arbitration provision in the Agreement. The trial court granted the motion, reasoning that petitioners had "failed to establish an

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[1] The mandatory arbitration provision reads, in part: "The parties to this contract, by entering into it, are giving up their legal right to have any dispute decided in a court of law before a jury, and instead are accepting the use of arbitration. It is understood that this agreement to arbitrate shall apply and extend to any dispute for medical malpractice, relating to the delivery of service under the plan, to any claims in tort, contract or otherwise, between Group [the employer], any individual(s) seeking services under the

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independent contractor status sufficient to pull them out of the binding arbitration provisions" in the Agreement. Petitioners then initiated this writ proceeding.

DISCUSSION

Petitioners contend that the trial court abused its discretion when it bound petitioners to the mandatory arbitration provisions of the Agreement, to which petitioners are not parties. We agree.

"Where the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) In such a case we must '"accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of the credibility of the witnesses and the weight of the evidence."' (*Ibid*.)" (*Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

"The strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement, and a party cannot be compelled to arbitrate a dispute that he has not agreed to resolve by arbitration." (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990, citing *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237.) Here, no one contends that petitioners are subject to the mandatory arbitration provision because they are parties to the Agreement. Rather, the

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plan . . . and Healthplan (including any of their agents, successors-or predecessors-in-
[footnote continued on next page]

trial court found that petitioners were subject to the arbitration provision because they had not presented sufficient evidence to show that their relationship with CIGNA was one of independent contractorship, rather than agency.

The trial court erred in two respects. First, the trial court improperly placed the burden on petitioners to establish that they are independent contractors and thus not subject to the mandatory arbitration provision of the Agreement. The burden of proving a contractual relationship between two parties falls on the proponent of the contract. (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767.) Moreover, the burden of proving an agency relationship rests with the party asserting the agency relationship. (*Magnecomp Corp. v. Athene Co.* (1989) 209 Cal.App.3d 526, 536.) Here, real party asserts that CIGNA had authority to bind petitioners to the Agreement and its mandatory arbitration provision because, as real party argues, CIGNA and petitioners had entered into an agency relationship. Thus, the burden of proof to establish agency and consequently petitioners' duty to arbitrate under the Agreement clearly rests with real party. Petitioners did not bear the burden to prove that they were independent contractors of CIGNA and thus not subject to mandatory arbitration.

Second, the trial court's conclusion that petitioners did not carry this misplaced burden is not supported by substantial evidence. In other words, the evidence presented conclusively establishes that petitioners are independent

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interest or employees)."

contractors of CIGNA rather than agents. The several agreements between CIGNA and petitioners each contain a provision similar to the one quoted here from the Group Practice Managed Care Agreement between CIGNA and the medical group. Section III(A)(1), entitled Independent Contractor Relationship, provides: "This Agreement is not intended to create or shall be construed to create any relationship between CIGNA and Group other than that of independent entities contracting for the purpose of effecting provisions of this Agreement. Neither party nor any of their representatives shall be construed to be the agent, employer, employee or representative of the other."

Each of the other agreements between CIGNA and one or more petitioners, contained in this record, contains similarly dispositive language. Compare this language with the arbitration provision in the Agreement, which requires binding arbitration of malpractice disputes between patients and CIGNA "including any of their agents, successors-or predecessors-in-interest or employees." The independent contractor provision clearly takes petitioners outside of the "agents, successors-or predecessors-in-interest or employees" language in the Agreement. The independent contractor provision also establishes that CIGNA had no authority to bind petitioners to the arbitration provision in the Agreement because CIGNA had not entered into an agency relationship with petitioners such that it had authority to contract on their behalf.

Finally, this result fits squarely within the holding of *Hollister v. Benzl* (1999) 71 Cal.App.4th 582. That case holds that a physician who is an independent contractor of a health plan, rather than an agent or employee, is not bound by the health plan's

agreement with its members. (*Id.* at p. 587.) We see no substantive difference between the determinative facts of *Hollister v. Benzl* and those of the instant matter. In each case, the medical provider is by explicit agreement an independent contractor of the health plan, and as such is not bound by any of the provisions of the health plan's agreement with its members. Thus, for the reasons described above, we can only conclude that petitioners are not bound by the arbitration provision in the Agreement and cannot be compelled to arbitrate.

DISPOSITION

The petition for writ of mandate is granted. The trial court is directed to vacate its order granting real party's motion to compel and enter a new order denying the motion. Petitioners are awarded their costs.

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/s/ Richli
Acting P. J.

We concur:

/s/ Ward
J.

/s/ King
J.